

DEVELOPER PARTICIPATION CONTRACT

THIS CONTRACT FOR DEVELOPER PARTICIPATION ("Contract") is made on the Countersignature Date by and between the **CITY OF HOUSTON, TEXAS** ("City"), a municipal corporation and home-rule city of the State of Texas principally situated in Harris County, acting by and through its governing body, the City Council and _____ ("Developer"), doing business in the State of Texas.

The initial addresses of the parties, which one party may change by giving written notice of its changed address to the other party, are as follows:

City

Developer

Director of Department of Public Works
and Engineering
or Designee
City of Houston
P.O. Box 1562
Houston, Texas 77251

PREAMBLE

WITNESSETH:

WHEREAS, the Developer intends to develop a tract located within the municipal boundaries of the City; and

WHEREAS, the Developer has paid all impact fees required by the City for such development for _____ ; and

WHEREAS, it is necessary to construct _____

(the "Project"); and

WHEREAS, the City has requested and the Developer has agreed to oversize the Project for the benefit of the City; and

WHEREAS, the City has agreed to participate in the cost of the Project in an amount not to exceed _____ as calculated according to the requirements of Article III herein; and

WHEREAS, this Participation Contract is authorized under Subchapter C, Chapter 212 of the Texas Local Government Code;

The City and the Developer hereby agree to the terms and conditions of this Contract. This Contract consists of the following sections:

TABLE OF CONTENTS

Page No.

PREAMBLE	1
TABLE OF CONTENTS	3
SIGNATURE PAGE.....	4
I. DEFINITIONS.....	5
II. DUTIES OF DEVELOPER	5
A. Wastewater Capacity, Bonds	5
B. Construction of the Project	6
C. Bids for Construction	7
D. INDEMNIFICATION	7
E. Insurance	8
F. Compliance with Laws	11
III. DUTIES OF CITY	11
A. Payment by City.....	11
IV. TERM AND TERMINATION.....	12
V. MISCELLANEOUS.....	13
A. Independent Contractor	13
B. Force Majeure	13
C. Severability	14
D. Entire Agreement.....	14
E. Notices	15
F. Acceptance and Approval	15
H. Enforcement	16
I. Risk of Loss.....	16
J. Non-Waiver	16

All of the above described sections and documents are hereby incorporated into this Contract by this reference for all purposes.

IN WITNESS HEREOF, the City and the Developer have made and executed this Participation Contract in multiple copies, each of which is an original.

ATTEST/SEAL (if a corporation):

WITNESS (if not a corporation):

By: _____

Name: _____

Title: _____

Developer@

By: _____

Name: _____

Title: _____

Tax I.D. No. _____

ATTEST/SEAL:

CITY OF HOUSTON, TEXAS

Signed by:

City Secretary

Mayor

APPROVED:

COUNTERSIGNED BY:

Director, Department of Public
Works and Engineering

City Controller

APPROVED AS TO FORM:

DATE COUNTERSIGNED:

Assistant City Attorney

L.D. File No.

I. DEFINITIONS

"Allowable Costs" includes the full cost of materials and labor for construction of the Project, but excluding costs of surveys, easements, engineering and inspection services.

"Allowable Oversizing Costs" _____ authorized for this Participation Contract. Allowable Oversizing Costs are the difference in Allowable Costs between the Project as bid for the oversizing requirements of this Participation Contract and the Project as bid without oversizing.

"City" is identified in the Preamble and includes its successors and assigns.

"Closing" is described in Article III.

"Developer" is identified in the Preamble and includes its successors and assigns.

"Participation Contract" means this agreement.

"Public Works Engineer" means the Director of Public Works and Engineering or such other person as may be designated by the Public Works Engineer by notice to the Developer to administer this Participation Contract.

"Project" is defined in the Preamble and Article II.

II. DUTIES OF DEVELOPER

A. Utility Capacity, Bonds

Prior to commencing for the Project:

(1) Developer shall execute performance and payment bonds acceptable to the City Legal Department in accordance with the requirements of § 212.073 of the Texas Local Government Code.

The amount of the performance and payment bonds shall be the full cost of Developer's construction contract.

(2) Developer shall obtain all necessary water and wastewater capacity for the Project as determined by the Department of Public Works and Engineering.

B. Construction of the Project

(1) The Developer shall construct the Project in a good and workmanlike manner in accordance with the engineering design approved by the Director prior to construction. The Project is depicted on the map or plat attached hereto as Exhibit "A".

(2) Developer shall be responsible for all engineering required for construction of the Project. Final engineering plans and drawings shall be submitted to the Public Works Engineer for approval prior to commencement of construction of the Project. Any change made by Developer to the final plans must be approved by the Public Works Engineer.

(3) Developer shall be responsible for acquiring all lands and right-of-way necessary for construction easements. Developer shall coordinate with the City and other utilities to minimize the possibility of damage to utilities in the Project area. Upon completion of the Project, Developer shall ensure that the Project is free and clear of all liens and encumbrances, including mechanics liens and purchase money security interests.

(4) At the time Developer believes that construction is completed, it shall notify the Public Works Engineer that it is ready for inspection of the Project by the Public Works Engineer. The Project shall not be considered complete until approved by the Public Works Engineer.

(6) Within 30 days of the Public Works Engineer's final inspection and approval of the Project, Developer shall provide the Public Works Engineer all documents required for Closing under Section III. A, including records and vouchers for all payments made by the Developer for Allowable Costs. Developer shall provide all documentation of Allowable Costs as required by the Public Works Engineer.

C. Bids for Construction

Developer must award the contract for construction of the Project on the basis of competitive bids. Bids may be formal (advertised) or informal. However, if informal bids are taken, solicitation must be made from at least three reputable contractor, approved by the Public Works Engineer.

D. INDEMNIFICATION

DEVELOPER COVENANTS AND WARRANTS THAT IT WILL PROTECT, DEFEND, AND HOLD HARMLESS THE CITY, ITS EMPLOYEES, OFFICERS, AND LEGAL REPRESENTATIVES (COLLECTIVELY, THE "CITY") FROM ANY AND ALL THIRD PARTY CLAIMS, DEMANDS, AND LIABILITY, INCLUDING DEFENSE COSTS, RELATING IN ANY WAY TO DAMAGES, CLAIMS, OR FINES ARISING BY REASON OF OR IN CONNECTION WITH DEVELOPER'S ACTUAL OR ALLEGED NEGLIGENCE OR OTHER ACTIONABLE PERFORMANCE OR OMISSION OF THE DEVELOPER IN CONNECTION WITH OR DURING THE PERFORMANCE OF THE DUTIES UNDER THIS PARTICIPATION CONTRACT. ALSO, DURING THE PERFORMANCE OF THE WORK AND UP TO A PERIOD OF ONE YEAR AFTER THE DATE OF FINAL ACCEPTANCE OF THE WORK, DEVELOPER FURTHER EXPRESSLY COVENANTS

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AND AGREES TO PROTECT, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE CITY FROM ALL CLAIMS, ALLEGATIONS, FINES, DEMANDS, AND DAMAGES RELATING IN ANY WAY TO THE ACTUAL OR ALLEGED JOINT AND/OR CONCURRENT NEGLIGENCE OF THE CITY AND DEVELOPER, WHETHER DEVELOPER IS IMMUNE FROM LIABILITY OR NOT.

IT IS THE EXPRESSED INTENTION OF THE PARTIES HERETO THAT THE INDEMNITY PROVIDED HEREIN IS AN AGREEMENT BY THE DEVELOPER TO INDEMNIFY AND PROTECT THE CITY FROM THE CITY'S OWN NEGLIGENCE WHERE SAID NEGLIGENCE IS AN ALLEGED OR ACTUAL CONCURRING PROXIMATE CAUSE OF ANY ALLEGED THIRD-PARTY HARM.

THE INDEMNITY PROVISION PROVIDED HEREIN SHALL HAVE NO APPLICATION TO ANY CLAIM OR DEMAND WHERE BODILY INJURY, DEATH, OR DAMAGE RESULTS ONLY FROM THE SOLE NEGLIGENCE OF THE CITY UNMIXED WITH ANY FAULT OF THE DEVELOPER.

NOTWITHSTANDING ANYTHING HEREIN TO THE CONTRARY, THE LIABILITY OF THE DEVELOPER UNDER THIS INDEMNITY PROVISION SHALL NOT EXCEED \$1,000,000 PER OCCURRENCE.

E. Insurance

With no intent to limit Developer's liability or the indemnification provisions set forth herein, the Developer shall provide and maintain certain insurance in full force and effect at all times during the term of this Participation Contract and any extensions thereto. Developer may satisfy this

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requirement through insurance policies in the name of its Contractor. Such insurance is described as follows:

- (a) Risks and Limits of Liability. The insurance, at a minimum, must include the following coverages and limits of liability:

<u>(Coverage)</u>	<u>(Limit of Liability)</u>
Workers's Compensation	Statutory for Worker's Compensation.
Employer's Liability	Bodily Injury by accident \$500,000 (each accident) Bodily Injury by Disease \$500,000 (policy limit) Bodily Injury by Disease \$500,000 (each employee)
Commercial General Liability: Including Broad Form Coverage, Contractual Liability, Bodily and Personal Injury, and Completed Operations	Bodily Injury and Property Damage, Combined Limits of \$1,000,000 each Occurrence and \$2,000,000 Aggregate
Automobile Liability Insurance (for automobiles used by the Developer in the course of its performance under this Agreement, including Employer's Non-Ownership and Hired Auto Coverage)	\$1,000,000 combined single limit per Occurrence

Aggregate Limits are per 12-month policy period
unless otherwise indicated.

- (b) Form of Policies. The insurance may be in one or more policies of insurance, the form of which must be approved by the Public Works Engineer. It is agreed, however, that nothing the Public Works Engineer does or fails to do shall relieve the Developer from its duties to provide the required coverage hereunder, and Public

Works Engineer's actions or inactions will never be construed as waiving City's rights hereunder.

- (c) Issuers of Policies. The issuer of any policy must have a Certificate of Authority from the State Department of Insurance to conduct insurance business in Texas or a rating of at least B+ and a financial size of Class VI or better according to the current year's Best's rating. Each issuer must be responsible and reputable, must have financial capability consistent with the risks covered, and shall be subject to approval by the Public Works Engineer in his or her sole discretion as to conformance with these requirements.
- (d) Insured Parties. Each policy, except those for Worker's Compensation, must name the City (and its officers, agents and employees) as Additional Insured parties on the original policy and all renewals or replacements during the term of this Participation Contract.
- (e) Cancellation. Each policy must expressly state that it may not be canceled or nonrenewed unless thirty days' advance notice of cancellation is given in writing to the Public Works Engineer by the insurance company. Developer shall give written notice to the Public Works Engineer within five days of the date upon which total claims by any party against Developer reduce the aggregate amount of coverage below the amounts required by this Participation Contract. In the alternative, the policy may contain an endorsement establishing a policy aggregate for the particular project or location subject to this Participation Contract.

- (f) Subrogation. Each policy must contain an endorsement to the effect that the issuer waives any claim or right in the nature of subrogation to recover against the City, its officers, agents or employees.

Proof of Insurance.

(a) Prior to commencing any services and at any time during the term of work under this Participation Contract, Developer shall furnish the Legal Department with Certificates of Insurance, accurately reflecting the insurance coverage that will be available during the contract term. If requested in writing by the Legal Department, the Developer shall furnish the City with certified copies of Developer's actual insurance policies. Failure of Developer to provide certified copies, as requested, may be deemed, in the Public Works Engineer's and/or City Attorney's discretion, to constitute a breach of this Participation Contract.

(b) Notwithstanding the proof of insurance requirements set forth above, it is the intention of the parties hereto that Developer, continuously and without interruption, maintain in force the required insurance coverages set forth above. Failure of the Developer to comply with this requirement shall constitute a default of Developer allowing the City, at its option, to immediately suspend or terminate work under this Participation Contract. Developer agrees that the City shall never be argued to have waived or be estopped to assert its right to terminate this Participation Contract hereunder because of any acts or omissions by the City regarding its review of insurance documents provided by Developer, its agents, employees or assigns.

F. Compliance with Laws

Developer shall comply with all applicable state and federal laws and regulations as well as all provisions of the City of Houston Charter and Code of Ordinances including all applicable provisions of Chapter 47 of the Houston Code of Ordinances.

III. DUTIES OF CITY

A. Payment by City

After completion of the Project, the Public Works Engineer shall schedule the Closing for payment to the Developer at a time and place convenient to the parties.

At or before the time of the Closing, Developer shall provide the Public Works Engineer:

- (1) All documents necessary to vest title to the Project in the City free and clear of any encumbrances as required by the City Legal Department.
- (2) Record drawings of the Project.
- (3) Affidavit of payment to subcontractors and materialmen.
- (4) An accounting of all Allowable Costs.

Upon receipt of the above-referenced items, the City shall pay the Developer 30% of all Allowable Costs plus 100% of the balance of Allowable Oversizing Costs; however, total reimbursement shall not to exceed _____.

IV. TERM AND TERMINATION

This Participation Contract is effective on the date of countersignature by the City Controller and shall remain in effect until completion of payment by the City unless the Contract is terminated under Section A or B herein.

A. The Participation Contract will terminate if (i) actual construction of the Project does not commence within 18 months of the Date of Countersignature or (ii) the Project is not completed within three years of the date Developer begins construction.

FAILURE OF THE DEVELOPER TO COMPLETE PERFORMANCE OF ITS APPLICABLE OBLIGATIONS UNDER THIS CONTRACT WITHIN EITHER OF THE TIME PERIODS SET OUT ABOVE SHALL CONSTITUTE A DEFAULT OF THIS CONTRACT BY DEVELOPER AND SHALL TERMINATE THE CITY'S DUTY TO REIMBURSE DEVELOPER FOR ANY ELIGIBLE COSTS HEREUNDER OR FOR ANY COSTS WHATSOEVER AND SHALL CONSTITUTE A WAIVER BY DEVELOPER OF ANY RIGHT TO CLAIM SUCH REIMBURSEMENT OR ANY OTHER COSTS OR DAMAGES ARISING OUT OF THE CONTRACT OR THE DESIGN AND CONSTRUCTION OF THE PROJECT. DEVELOPER'S FAILURE TO COMPLETE ITS OBLIGATIONS TIMELY AS SET OUT ABOVE SHALL NOT REQUIRE THE CITY TO GIVE NOTICE OF DEFAULT AS DESCRIBED BELOW OR TO GIVE DEVELOPER ANY TIME TO CURE.

B. For any other reason except Developer's failure to complete its obligations timely, either party may terminate its performance under this Contract in the event of default by the other party and a failure by that party to cure such default receiving notice thereof, all as provided in this Section. Default shall occur if a party fails to observe or perform any of its duties under this

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Participation Contract. Should such a default occur, the injured party shall deliver a written notice to the defaulting party describing such default and the proposed date of termination. Such date may not be sooner than the 30th day following receipt of the notice. The injured party, at its sole option, may extend the proposed date of termination to a later date. If prior to the proposed date of termination, the defaulting party cures such default, then the proposed termination shall be ineffective. If the defaulting party fails to cure such default prior to the proposed date of termination, then the injured party may terminate its performance under this Participation Contract as of such date. The Director may give such notice for the purposes of this Contract.

V. MISCELLANEOUS

A. Independent Contractor

Developer is engaged as an independent contractor, and all of the services provided for herein shall be accomplished by Developer in such capacity. The City of Houston will have no control or supervisory powers as to the detailed manner or method of the Developer's performance of the subject matter of this Participation Contract. All personnel supplied or used by Developer shall be deemed employees or subcontractors of Developer and will not be considered employees, agents or subcontractors of the City of Houston for any purpose whatsoever. Developer shall be solely responsible for the compensation of all such personnel, for the withholding of income, social security and other payroll taxes and for the coverage of all worker's compensation benefits.

B. Force Majeure

"Force Majeure" includes, but is not limited to, acts of God, acts of the public enemy, war, blockades, insurrection, riots, epidemics, landslides, lightning, earthquakes, fires, storms, floods, washouts, tornadoes, hurricanes, arrests and restraints of government and people, explosions, and any other inability of either party to carry out its obligations under this Participation Contract, except strikes or labor disputes and breakage or damage to machinery or equipment, whether similar to those enumerated or otherwise, and not within the control of the party claiming such inability, and which by the exercise of due diligence and care such party could not have avoided.

If, because of Force Majeure any party hereto is rendered unable, wholly or in part, to carry out its obligations under this Participation Contract, then such party shall give to the other party prompt written notice of the Force Majeure with reasonable full details concerning it; thereupon the obligation of the party given the notice, so far as they are affected by the Force Majeure, shall be suspended during, but no longer than, the continuance of the Force Majeure. The affected party shall use all possible diligence to remove the Force Majeure as quickly as possible, but his obligation shall not be deemed to require the settlement of any strike, lockout, or other labor difficulty contrary to the wishes of the party involved.

C. Severability

In the event any term, covenant or condition herein contained shall be held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant or condition herein contained, provided that such invalidity does not materially prejudice either the Developer or the City in their respective rights and obligations contained in the valid terms, covenants or conditions hereof.

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D. Entire Agreement

This Participation Contract merges the prior negotiations and understandings of the parties hereto and embodies the entire agreement of the parties, and there are not other agreements, assurances, conditions, covenants (expressed or implied) or other terms with respect to the Project, whether written or verbal, antecedent or contemporaneous, with the execution hereof.

E. Notices

All notices required or permitted hereunder shall be in writing and shall be deemed delivered when actually received or, if earlier, on the third day following deposit in a United States Postal Service post office or receptacle with proper postage affixed (certified mail, return receipt requested) addressed to the respective other party at the address prescribed in the preamble of this Participation Contract or at such other address as the receiving party may have theretofore prescribed by notice to the sending party.

F. Acceptance and Approval

An approval by the Public Works Engineer, or by any other instrumentality of the City, of any part of Developer's performance shall not be construed to waive compliance with this Participation Contract or to establish a standard of performance other than required by this Participation Contract or by law. The Public Works Engineer is not authorized to vary the terms of this Participation Contract.

G. Inspections and Audits

Representatives of the City shall have the right to perform, or cause to be performed, (1) audits of the books and records of the Developer relating to the Project, and (2) and inspections of

all places where work is undertaken in connection with the Project. The Developer shall be required to keep such books and records available for such purpose for at least three (3) years after the ceasing of its performance under this Participation Contract. Nothing in this provision shall affect the time for bringing a cause of action nor the applicable statute of limitations.

H. Enforcement

The City Attorney or his or her designee shall have the right to enforce all legal rights and obligations under this Participation Contract without further authorization. Developer covenants to provide to the City Attorney all documents and records that the City Attorney deems necessary to assist in determining Developer's compliance with this Participation Contract, with the exception of those documents made confidential by federal or State law or regulation.

I. Risk of Loss

Risk of loss or damage to the Project shall pass from the Developer to the City upon Closing.

J. Non-Waiver

Failure of either party hereto to insist on the strict performance of any of the agreements herein or to exercise any rights or remedies accruing hereunder upon default or failure of performance shall not be considered a waiver of the right to insist on, and to enforce by any appropriate remedy, strict compliance with any other obligation hereunder or to exercise any right or remedy occurring as a result of any future default or failure of performance.